



White Paper

Electronic Signatures

E-SIGN and UETA: Another Step Toward Paperless Transactions

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PART ONE: INTRODUCTION

Ohio, among other states and the federal government, have each taken steps to clear the uncertainty surrounding enforceability of e-signatures and electronic records, or e-records. In 2000, the Ohio Uniform Electronic Transactions Act, or UETA and the federal Electronic Signatures in Global and National Commerce Act, or the federal E-SIGN Act, both became effective.

How do E-SIGN and UETA affect the transaction? Although technology makes the transaction technically possible, E-SIGN and UETA reassure all parties to the transaction that the electronic transaction is legally enforceable. The purpose of this white paper is to summarize the key provisions of UETA and E-SIGN.

PART TWO: OVERVIEW OF UETA AND E-SIGN

1. Why Both Laws?

The overlap of the laws raises the question, "Why both?" UETA validates electronic transactions at the state level. However, not all states have adopted UETA. Moreover, each state's version of UETA varies to some extent from the model statute. Therefore, E-SIGN validates electronic transactions at the national level. As a federal law, to ensure national uniformity in the treatment of electronic transactions, E-SIGN closely parallels UETA's model statute and provides expressly that it preempts both (1) a state's version of UETA to the extent it is inconsistent with E-SIGN and (2) other inconsistent state law.

2. It's Okay to Conduct Business Transactions Online

Both UETA and E-SIGN reassure businesses and consumers that it is, in fact, okay to conduct business transactions online. At the heart of both UETA and E-SIGN are two pronouncements: (1) an e-signature or e-record is not unenforceable simply because it is in electronic form and (2) an e-contract may not be denied enforceability solely because an e-record was used in its formation. Put another way, UETA and E-SIGN put e-signatures, e-records and e-contracts on the same footing as written signatures, records and contracts.

3. It's Okay to Use Electronic Promissory Notes

Both UETA and E-SIGN authorize the use of electronic promissory notes by including "transferable record" provisions which give legal effect to transferable records. The UETA provision applies to all notes (and to all documents of title). The E-SIGN provision applies only to notes secured by real estate.

4. It's Okay to Use Any Technology

Both UETA and E-SIGN are "technology neutral." That is, neither law requires the use of any specific language or technology to create a signature. Instead, each law lets developing technology and the free market dictate the preferable method for an electronic transaction. Ultimately, therefore, the parties to the transaction have the freedom to specify the technology--and accompanying security measures--to accomplish the transaction. Therefore, simply typing your name at the bottom of an email or clicking on an "I accept" button may suffice.

5. It's Okay to Conduct Consumer Transactions Electronically - But Beware of the Special Protections for Consumers

Many consumer protection laws, such as the federal Truth in Lending Act, require disclosures to consumers to be in writing. E-SIGN and UETA provide that an e-record satisfies the writing requirement. However, in response to consumer advocates' concerns, each law contains certain "consumer friendly" provisions under which the writing requirement is only satisfied if certain conditions specified in that law are met.

6. It's Okay To Notarize Documents Electronically

Currently, forms recorded in real estate transactions and other formal documents must be notarized in accordance with state law. E-SIGN permits electronic notarization if the document bears the e-signature of the notary together with the other required information and is "attached to or logically associated with a signature or record."

7. What About Record Retention and Originals?

Under the laws, if an existing statute or regulation (including the record-keeping requirements imposed on brokers by the Division of Real Estate) requires records to be retained--or to be retained in their original form, an e-record of the information satisfies either requirement as long as the e-record "accurately reflects" the information in the record and "remains accessible" in a form capable of being "accurately reproduced for later reference, whether by transmission, printing or otherwise."

8. Exclusions from Coverage Affecting Real Estate

E-SIGN and UETA exclude from their coverage, with respect to real estate, both foreclosures and default relating to a primary residence.

PART THREE: QUESTIONS AND ANSWERS

Q: Do you have to agree to use or accept e-signatures or e-records?

A: No. But if you choose to do so, or use them in forming a contract, it will now be legal in all fifty jurisdictions.

Q: Does E-SIGN affect any laws not related to electronic transactions?

A: No. All rights and obligations provided by statute or regulation still apply, including state and federal laws prohibiting deceptive trade practices, proximity requirements for warnings and disclosure requirements.

Q: Can contracts and other records required by law or by the Division of Real Estate to be stored electronically, even if the law requires an original to be kept?

A: Yes. However the information in the record must be retained accurately and must be accessible and capable of being accurately reproduced.

Q: Can I notarize a contract electronically?

A: yes. If the law requires a signature or record to be notarized, acknowledged, verified or made under oath, the requirement is satisfied if the e-signature of the notary, together with all other information required by law to be included, is attached to or logically associated with the e-signature or e-record.

Q: Can I rely on an electronic agent?

A: Yes. A contract may not be denied legal effect, validity or enforceability solely because an electronic agent is used in its formation, creation or delivery so long as the action of the electronic agent is legally attributable to the person to be bound.

Q: May a transferable record be in electronic form?

A: Yes. However, transferable records must meet stringent requirements for setting up a system and demonstrating that a person has control of such a record.

Q: Will E-SIGN apply regardless of UETA?

A: No. Ohio's adopted version of UETA applies to the extent it is not inconsistent with E-SIGN.

Q: Can my business provide consumer disclosures electronically?

A: Yes, if a consumer consents to receiving the disclosures electronically and has not withdrawn his or her consent. Be aware that the laws establish specific procedures for consent.

Q: How do the laws affect regulated industries?

A: The laws do not affect the rulemaking authority of federal or state regulators, which are specifically granted the authority to interpret the laws under their current rulemaking authority provided that any regulations are consistent with--and don't add to--the laws and provided in addition that any regulations are substantially equivalent to regulations imposed on paper.

Q: Can regulators require me to use a specific technology?

A: Yes. An agency may require use of a specific technology if it serves an important government objective and use of the technology is substantially related to achieving that objective. In addition, when requiring that contracts or records be maintained, regulators and agencies may establish

performance standards to assure their integrity. A regulator may not require use of a particular type of hardware or software.

Q: Can regulators still require records to be kept on paper?

A: Yes, if there is a compelling governmental interest relating to law enforcement or national security and the requirement is essential to achieving that interest.

Q: Do agencies need to comply with consumer consent requirements?

A: Not always. Regulators may exempt a specified type of record from E-SIGN's consumer consent requirements if an exemption is needed to eliminate a substantial burden on e-commerce and will not increase the material risk of harm to consumers.

PART FOUR: UETA AND E-SIGN IN PRACTICE

1. Risks

What are some of the potential traps of UETA and E-SIGN?

- It may be difficult to confirm or prove that a typed name or mark was (or was not) intended to be an e-signature.
- It may be difficult to confirm or prove that an informal exchange of e-mails was (or was not) intended to be an e-contract.
- It may be difficult to confirm or prove that the person to whom an e-mail was sent (and not a third party with access to such person's computer) was the person who responded with an e-signature.
- It may be difficult to prove that the other party to the e-contract altered it after its execution.
- Because there is little case law discussing what constitutes an "e-signature" under the laws the boundaries are still blurred, so REALTORS (and lenders and other businesses) need to exercise care in their electronic transactions with customers to avoid being (or to ensure they are) contractually bound.

2. Protective Measures

What are some possibilities for avoiding the traps of E-SIGN?

- Choose as technology, at least for now, if practicable, digital signature technology. A digital signature is an encrypted code attached to an electronic message verifying the identity of the sender to the recipient. Although digital signatures may be complicated and expensive, the encryption guarantees the confidentiality, authenticity and integrity that other electronic signatures lack.
- Express in any e-contract the parties' desire that it be enforced.

- Acknowledge expressly in any e-contract that each party has "signed" it, that it has been confirmed electronically, that each party has the ability to communicate electronically, and that the e-contract is compatible with the parties' respective hardware and software systems. Alternatively, consider adding a provision to require a password-protected disclaimer to accompany the typed signature.
- Include a merger clause in any e-contract.
- Restrict access to your computer and other electronics, including fax machines, making sure they are password protected and locked up.
- Add a legend to your e-mails stating expressly that it is not intended to be a legally binding agreement and is not legally binding, valid and enforceable.
- Consider a policy mandating use of the above legend and outlining the circumstances under which e-contracts will be used and authorization for e-contracts will be granted.
- Confirm by telephone the other party's intent to enter into a binding e-contract.
- Send a confirmatory e-mail to the other party after the e-contract is completed and request the other party to respond.
- If your business is considering a vendor to supply transferable record technology, the vendor should provide a detailed description of its systems and the agreement with that vendor should include warranties from the vendor that the system satisfies the control requirements in the laws and should require the vendor to have sufficient insurance to back up the warranties if there are any problems.

The information presented in this White Paper is not intended to be--and should not be construed as--legal advice. Before applying this information to a specific legal problem, readers are urged to seek advice from their own legal counsel.



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